IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 220 of 1983

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ABDULKARIM ASHRAFBHAI MUSLIM & 2 - Appellant(s)

Versus

GULAMMOHMAD MOHAMADHUSEIN @ BAXIDADA MOHMADHUSEIN & 1 - Defendant(s)

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Appearance :

MS. K. N. VALI KARIMWALA for Appellant(s) : 1 - 3.
MR. J. C. VYAS for Defendant(s) : 1, 1.2.2, 1.2.3,1.2.4 - 2.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

Date : 24/11/2005

ORAL JUDGMENT

By this First Appeal, the appellants, original plaintiffs in Civil Suit No.1864 of 1979, in the City Civil Court at Ahmedabad, challenge the judgment and decree rendered in the said suit on 9th December, 1982

whereby, the suit was partly decreed against the defendants, restraining them from entering in any of the portion of property bearing survey No.4520/A or causing any damage or making any construction in that property, except putting a stair-case as shown in the plan at Exh.37 for having access from the property bearing survey No.4520/A to property bearing survey No.4517 and rejected the rest of the prayers.

2. The plaintiffs – appellants had preferred the said suit to obtain perpetual injunction, restraining the defendants from removing or pulling down or causing any damage to northern wall of the plaintiffs' property bearing Survey No.4520 and restraining the defendants from entering in any portion of Survey No.4520/A or making any construction on it or causing any damage to the property. It was the case of the plaintiff that property bearing City Survey No.4520 and 4517, situate at Shahpur, were purchased by grandfather of plaintiffs No.1 and 2, Rehmanbhai Rahimbhai by a sale-deed dated 22/12/1927 from one Abdul Karim. Property bearing City Survey No.4518 is situated to the north of property bearing City Survey No.4520. According to the plaintiff, defendants were the owners of the property

bearing City Survey No.4519 and it was alleged that they were making construction in a manner, which would damage the northern wall of property bearing City Survey No.4520.

3. The case of the defendants – respondents on the other hand has been that, they were making construction on their own property bearing Survey Nos.4517 and 4519 in a lawful manner after obtaining necessary permission from the Municipal Corporation as per plans approved by Municipal Authorities, and the plaintiffs have no right or authority to restrain the defendants from carrying out the construction.

4. The trial Court, after considering the rival side pleadings, framed issues at Exh.20 as under.

I S S U E S

1) Is the suit not maintainable in the present form ?

2) Do the plaintiffs prove that the northern side wall of the property bearing survey No.4520 is of the exclusive ownership of the plaintiffs ?

3) Do the defendants prove that the northern side wall of the property bearing survey No.4520 is of

the exclusive ownership of the defendants ?

4) Do the plaintiffs prove that the defendants have, during the course of re-construction of the properties bearing survey Nos.4517 and 4519, trespassed the encroached and have damaged the northern side wall of the property of survey No.4520 and or have illegally started constructing the new wall removing the old wall illegally ?

5) Are the plaintiffs entitled to perpetual injunction restraining the defendants from removing or pulling down the northern side wall or damaging the side wall of survey No.4520, and also restraining the defendants from entering in any portion of the property bearing survey No.4520/A or making any damages or construction in that property?

6) Is it proved that the defendants were constructing their property bearing survey No.4517 and 4519 in the lawful manner and with the necessary permission from the Ahmedabad Municipal Corporation and as per the plans approved by the Municipal Authorities ?

(7-A) Do the defendants establish that prior to the filing of the present suit, the construction work of

the premises bearing survey No.4517 and 4519 was already over ?

(7-B) If yes, whether the plaintiffs are entitled for the relief prayed for ?

(8) What order and decree ?

4.1 The trail Court gave findings on the issues as under.

1. Not pressed by the defendants.
2. Not pressed by the defendants.
3. Not pressed by the defendants.
4. Not pressed by the plaintiffs.
5. First part, so far Survey No.4520 is concerned, is not pressed by the plaintiff. So far second part is concerned, in the affirmative, except putting ladder in survey No.4520/A for going to survey No.4517 as shown in Municipal Plan Exh.37.
6. In the affirmative.

7-A Not pressed by the parties.

7-B As per findings on issue No.5.

8. As per final order.

5.After considering the evidence and giving the findings as above, the trial Court passed the decree.

6. Learned Advocate, Ms.K.N. ValiKarimwala, for the appellants is present. No one to represent the respondents.

7. Ms.K.N. ValiKarimwala, submitted that the trial Court has committed an error in permitting the defendants to put up a stair-case as per Municipal plan placed on record at Exh.37 and, therefore, this appeal may be allowed.

8. The question arises for determination by this Court is whether the trial Court committed an error in evaluating the evidence, while permitting the defendants to put up a stair-case or while rejecting the other reliefs to the plaintiffs. In the opinion of this Court, the answer to the question would be in the negative for the reasons, that would be indicated in the paragraphs to follow.

9. This Court has gone through the judgment impugned herein, as well as, records and proceedings. It is clear from the evidence of plaintiff No.2, that whatever the construction has been made by the defendants was made in the property of the defendants

and they have not encroached upon any portion of the property bearing Survey No.4520. It also appears from the evidence, that access to survey No.4520 is on the western side, while access to property bearing survey No.4517 is on the northern side. Map at Exh.37 indicates that the defendants have access to have their properties survey No.4520/A only through survey No.4517 by putting up a stair-case, and therefore, the said plans were approved by Municipal Corporation. It also appears from the evidence of Iqbal Hussain Mohamad Hussain that properties bearing survey No.4520/A and 4520/B are situated to the north of survey No.4517 and that there was a wall between the said properties. It is also in evidence that both the properties bearing survey No.4517 and 4520 originally belonged to Abdul Rehman Abdul Karim, from whom grandfather of plaintiffs No.1 and 2 had purchased the said properties by sale-deed in the year 1927. The trail Court has taken into consideration the evidence led by the parties and concessions made on behalf of the parties in respect of the property and their user. It is evident that there are photographs showing horizontal lines to show earlier existence of a stair-case. It is noticed that the plan at Exh.37 approved by the Municipal Corporation bears signature of plaintiff No.2, and

therefore, plaintiff No.2 had consented for putting up the stair-case. Considering other relevant aspects, the trail Court has passed the decree.

10.Learned Advocate, Ms.K.N. Vali Karimwala, was not able to assail the judgment and decree on any perversity in evaluation of evidence nor any illegality is shown. This Court has also examined the evidence and is also of the same view, as taken by the trail Court. The reasonings adopted by the trail Court appear just, legal and proper and, there is no need for any interference at the hands of this Court; in the judgment and decree impugned herein. The appeal must fail and stands dismissed. No order as to costs.

(A.L.DAVE, J.)

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